Union Insurance Malaysia Sdn Bhd v Chan You Young

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–26 OF 1994
ABDUL MALIK ISHAK J
25 SEPTEMBER 1995

Insurance *— Motor insurance — Construction of policy — Third party motor insurance — Husband was owner of car and policyholder — Son was authorized driver —Wife travelling in motor car as passenger — On her way to work — Accident occurred as a result of son's negligence — No passenger liability cover — Rule of construction to be adopted — Whether insurer liable to indemnify husband as policyholder — Whether wife was a member of the son's household — Whether wife was a passenger 'carried by reason of or in pursuance of a contract of employment'*

Insurance *— Motor insurance — Compulsory third party motor insurance — Wife travelling in husband's motor car as passenger — Son was authorized driver — Accident occurred as a result of son's negligence — Whether wife could sue husband and son — Whether husband a tortfeasor — Whether wife's action barred by s 9(2) of Married Women Act 1957*

Insurance *— Motor insurance — Compulsory third party motor insurance — Authorized driver covered by policy — Whether court could substitute the words 'authorized driver' for the the word 'policyholder' in every relevant place of policy to determine liability of authorized driver*

Tort *— Action against spouse — Statute preventing action against spouse in tort — Whether statute applicable in wife's action against husband based on vicarious liability — Married Women Act 1957 s 9(2)*

In this case, a Mdm Chan You Young ('the respondent') suffered injuries when the motor car she was travelling in on her way to work met with an accident. The motor car belonged to her husband and it was driven by her son with the consent and authority of her husband at the material time. The motor car was insured by Union Insurance Malaysia Sdn Bhd ('the appellant') under a policy ('the policy') which covered the husband, and pursuant s II cl 2(a) of the policy, the son as the authorized driver. The respondent successfully sued her husband as the owner and her son as the negligent driver of the motor car. However, the appellant, as the insurer, refused to satisfy the judgement the respondent had obtained. It followed that the respondent filed recovery proceedings against the appellant under s 96 of the Road Transport Act 1987 in the sessions court. Her claim was allowed. The appellant appealed to the High Court. Counsel for the appellant argued that the appellant was not liable to indemnify the respondent's husband because the coverage under the policy did not extend to the respondent, and that the respondent's husband had failed to take out a passenger liability cover. Counsel for the appellant further contended that the judgment was invalid on the ground that the respondent had sued her husband for a tort purportedly committed by him and that

such action was not, therefore, maintainable by virtue of s 9(2) of the Married Women Act 1957 ('the MWA')

Held, dismissing the appeal:

(1) Section II cl 1(a) of the policy which generally laid down the extent of coverage in respect of third party liability, provided that the appellant would indemnify the policyholder in respect of injuries suffered by a third party arising out of the use of the policyholder's motor car, subject to two exceptions, ie (i) if the third party was injured 'in the course of the employment of such person by the insured the policyholder'; and (ii) if the third party as a passenger 'was a member of the insured's the policyholder's household' (see p 127D–E).

(2) Although s II cl 1(a) was silent as far as the authorized driver was concerned, the court must substitute the words 'authorized driver' for the word 'policyholder' in every relevant place, in order to determine the liability of the authorized driver (see p 127I); *Richards v Cox* [1943] 1 KB 139 and *Lim Eng Yew v United Oriental Assurance Sdn Bhd* [1989] 1 MLJ 454 followed.

(3) In the instant case, the respondent was a third party for the purposes of the policy, and she was not injured in the course of her employment with her son, the authorized driver, within the meaning of the first exception to cl 1(a), as substituted. On this basis alone, the respondent fell squarely under cl 1(a) of the policy, and was entitled to claim under the policy (see p 131D–E).

(4) In construing a document, the contra proferentum rule of construction would apply where the words in their ordinary meaning give rise to two distinct interpretations resulting in an ambiguity. Applying the contra proferentum rule to the policy in this case, the respondent was not a member of her son's household within the meaning of exception (ii) to cl 1(a), as substituted, simply because the son was not the head of the respondent's family. On this ground also, the appellant was bound to satisfy the judgment obtained (see pp 132C and 133F); *Cornish v The Accident Insurance Co Ltd* (1889) 23 QBD 453 and *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 followed.

(5) Clause 9 of endorsement D of the policy provided, inter alia, that the appellant should not be liable in respect of bodily injury to any other person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in the relevant vehicle. Applying the contra proferentum rule to the words in brackets, the respondent could either have the contract of employment with her husband, the policyholder, or her employer. Hence, the respondent was

in the husband's motor car 'by reason of her contract of employment with her employer' (see pp 127C and 133H); *Izzard v Universal Insurance Co* [1937] 3 All ER 79; *Wong Kon Poh v New India Assurance Co Ltd* [1970] 2 MLJ 287 followed.

(6) If the appellant wished to exclude the respondent, such exclusion had to be expressly stated in the policy in plain terms (see p 134A).

(7) Another approach to be adopted in construing cl 9 endorsement D was to consider the words in brackets disjunctively. This construction would mean that the expression 'by reason of a contract of employment' must be read disjunctively from the expression 'in pursuance of a contract of employment' because of the presence of the word 'or' in between those expressions. Accordingly, by reason of a contract of employment with a third party, the respondent could obtain judgment against the appellant (see p 135E).

(8) By virtue of the terms of the policy, the respondent could enforce the policy against either the policyholder (her husband) or the authorized driver (her son), and the paymaster, at the end of the day, would be the appellant (see p 136E).

(9) Section 9(2) of the MWA prevents actions in tort against a spouse. In the instant case, the respondent's action against her husband was not based on an action in tort but on the vicarious liability that attached to him as a result of the negligence of his authorized driver, ie his son. The husband was not the tortfeasor. Since there is no tort of 'vicarious liability', s 9(2) was not applicable (see pp 136H and 137A–B).

(10) Further, the action by the respondent wife could also be construed to be an action to protect her property which by virtue of s 9(1) of the MWA would be permissible (see p 139I).

[Bahasa Malaysia summary

Dalam kes ini, seorang yang bernama Puan Chan You Young ('penentang') telah mengalami kecederaan apabila kereta yang dia naik dalam perjalanan untuk bekerja terlibat dalam suatu kemalangan. Kereta tersebut dipunyai oleh suaminya dan ia dipandu oleh anak lelakinya dengan kebenaran dan autoriti suaminya pada masa material itu. Kereta itu diinsuranskan oleh Union Insurance Malaysia Sdn Bhd ('perayu') di bawah satu polisi ('polisi tersebut') yang melindungi si suami, dan menurut fasal 2(a) s II polisi tersebut, anak lelakinya yang merupakan pemandu yang diberikuasa. Penentang telah berjaya mendakwa suaminya sebagai pemunya, dan anak lelakinya sebagai pemandu cuai kereta tersebut. Walau bagaimanapun, perayu, sebagai penginsurans, enggan memuaskan penghakiman yang telah diperolehi oleh penentang. Ekoran itu, penentang telah memfailkan prosiding

mendapat kembali terhadap perayu di bawah s 96 Akta Pengangkutan Jalan 1987 ('APJ') di mahkamah sesyen. Tuntutannya telah dibenarkan. Perayu merayu kepada Mahkamah Tinggi. Peguam perayu berhujah bahawa perayu tidak bertanggungan untuk menanggung rugi suami penentang kerana liputan di bawah polisi tersebut tidak merangkumi penentang, dan bahawa suami penentang telah gagal untuk mendapatkan suatu liputan liabiliti penumpang. Peguam perayu selanjutnya berhujah bahawa penghakiman adalah tidak sah atas alasan bahawa penentang telah mendakwa suaminya atas tort yang dikatakan telah dilakukan olehnya, dan tindakan penentang tersebut tidak boleh dikekalkan akibat s 9(2) Akta Perempuan Bersuami 1957 ('APB').

Diputuskan, menolak rayuan itu:

(1) Fasal 1(a) s II polisi tersebut yang membentangkan takat liputan liability pihak ketiga secara umum, memperuntukkan bahawa perayu-perayu akan menanggung rugi pemegang polisi berkaitan dengan kecederaan yang dialami oleh pihak ketiga yang bangkit daripada kegunaan kereta pemegang polisi, tertakluk kepada dua kekecualian, iaitu (i) jika pihak ketiga tercedera 'dalam perjalanan penggajiannya oleh pemegang polisi'; dan (ii) jika pihak ketiga sebagai seorang penumpang 'merupakan seorang ahli keluarga pemgang polisi' (lihat ms 127D–E).

(2) Walaupun fasal 1(a) s II adalah senyap sejauh mana ia adalah berkenaan dengan pemandu yang diberikuasa, mahkamah harus menggantikan perkataan 'pemandu yang diberikuasa' dengan perkataan 'pemegang polisi' di setiap tempat yang relevan, untuk menentukan liabiliti pemandu yang diberikuasa (lihat ms 127I); *Richards v Cox* [1943] 1 KB 139 dan *Lim Eng Yew v United Oriental Assurance Sdn Bhd* [1989] 1 MLJ 454 diikut.

(3) Dalam kes ini, penentang merupakan seorang pihak ketiga untuk tujuan polisi, dan dia tidak cedera dalam perjalanan penggajian dengan anak lelakinya, pemandu yang diberikuasa tersebut, dalam maksud kekecualian pertama kepada fasal 1(a), seperti mana yang telah diganti. Atas alasan ini sahaja, penentang dirangkumi oleh fasal 1(a) polisi itu, dan adalah berhak untuk menuntut di bawah polisi tersebut (lihat ms 131D–E).

(4) Dalam pentafsiran suatu dokumen, rukun pentafsiran contra proferentum akan terpakai di mana perkataan-perkataan dalam maksud biasa mereka menimbulkan dua pentafsiran yang jelas berbeza yang menyebabkan suatu ketaksaan. Dengan memakai rukun contra proferentum kepada polisi tersebut dalam kes ini, penentang bukan seorang ahli keluarga anak lelakinya dalam maksud kekecualian (ii) kepada fasal 1(a), seperti mana yang telah diganti, kerana anak lelakinya bukan merupakan ketua

keluarga penentang. Atas alasan ini juga, perayu harus memuaskan penghakiman yang diperolehi (lihat ms 132C dan 133F); *Cornish v The Accident Insurance Co Ltd* (1889) 23 QBD 453 dan *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29 diikut.

(5) Fasal 9 pengendorsan D polisi tersebut memperuntukkan, antara lain, bahawa perayu-perayu tidak akan bertanggungjawab atas kecederaan fizikal kepada mana-mana orang (melainkan seorang penumpang yang dibawa atas sebab atau menurut satu kontrak pekerjaan) yang dibawa dalam kenderaan yang berkenaan itu. Dengan memakai rukun contra proferentum kepada perkataan-perkataan dalam kurungan, penentang boleh sama ada mempunyai kontrak pekerjaan dengan suaminya, iaitu pemegang polisi, atau majikannya. Oleh itu, penentang berada dalam kereta suaminya 'atas sebab kontrak pekerjaan dengan majikannya' (lihat ms 127C dan 133H); *Izzard v Universal Insurance Co* [1937] 3 All ER 79 dan *Wong Kon Poh v New India Assurance Co Ltd* [1970] 2 MLJ 287 diikut.

(6) Jika perayu ingin mengecualikan penentang, ketakmasukan begitu harus dinyatakan secara nyata dalam polisi dalam terma jelas (lihat ms 134A).

(7) Suatu lagi pendekatan yang boleh dipakai dalam pentafsiran fasal 9 Pengendorsan D ialah dengan mempertimbangkan perkataan-perkataan dalam kurungan secara penyarak. Pentafsiran ini bermakna ungkapan 'atas sebab satu kontrak pekerjaan' mesti dibaca secara penyarak daripada ungkapan 'menurut satu kontrak pekerjaan' akibat kehadiran perkataan 'atau' antara dua ungkapan itu. Ekoran itu, atas sebab wujudnya suatu kontrak pekerjaan dengan satu pihak ketiga, penentang boleh mendapat penghakiman terhadap perayu (lihat ms 135E).

(8) Mengikut terma polisi tersebut, penentang boleh menguatkuasakan polisi tersebut terhadap sama ada pemegang polisi (suaminya) atau pemandu yang diberikuasa (anak lelakinya), dan pihak yang harus membayar pada akhirnya adalah perayu (lihat ms 136E).

(9) Seksyen 9(2) APB mencegah tindakan dalam tort terhadap seseorang suami/isteri. Dalam kes ini, tindakan penentang terhadap suaminya bukan berasaskan tindakan dalam tort tetapi atas liabiliti vikarius suaminya akibat kecuaian pemandu yang diberikuasa, iaitu anak lelakinya. Suami bukanlah pelaku tort. Oleh kerana tort 'liabiliti vikarius' tidak wujud, s 9(2) tidak terpakai (lihat ms 136H dan 137A–B).

(10) Selanjutnya, tindakan penentang yang merupakan seorang isteri juga boleh ditafsirkan sebagai suatu tindakan untuk melindungi hartanya yang dibenarkan di bawah s 9(1) APB (lihat ms 139I).]

A **Notes**

For cases on motor insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 133–214.

Cases referred to

B *Central Lorry Service Co Sdn Bhd v The American Insurance Co* [1981] 2 MLJ 40
Chan Kum Fook & Ors v The Welfare Insurance Co Ltd [1975] 2 MLJ 184
China Insurance Co Ltd v Teh Lain Lee & Anor [1977] 1 MLJ 1
C *Cornish v The Accident Insurance Co Ltd* (1889) 23 QBD 453
Curtis v Wilcox [1948] 2 All ER 573
Daning bin Laja v KK Hj Tuaran bin Majid [1993] 1 CLJ 44
English v Western [1940] 2 All ER 515
Harpushad v Shoe Dyal (1876) LR 3 IA 259
Izzard v Universal Insurance Co [1937] 3 All ER 79
D *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85
Lim Eng Yew v United Oriental Assurance Sdn Bhd [1989] 1 MLJ 454
Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29
Mohamed Mustafa v Kandasami [1979] 2 MLJ 109
E *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 658
Richards v Cox [1943] 1 KB 139
Scottish Amicable Heritage Securities Association Ltd v Northern Assurance Co (1883) 11 R (Ct of Sess) 287
F *Smith v Moss & Anor* [1940] 1 All ER 469
Watson v Phipps (1985) 60 ALJR 1
Wong Kon Poh v New India Assurance Co Ltd [1970] 2 MLJ 287
Yong Pak Yong v PP [1959] MLJ 176

G **Legislation referred to**

Married Women Act 1957 ss 9(1), (2)
Married Women's Property Act 1882 ss 12, 24 [UK]
Motor Vehicles (Third Party Risks and Compensation) Act (Cap 88) ss 4(3), 8(1) [Singapore]
Road Traffic Ordinance 1958 s 80(1)
H Road Transport Act 1987 s 96

RA Kumar (*Nijar Kumar Netto & Partners*) for the appellant/defendant.
Philip Nainan (*Abdul Rahman Saad & Associates*) for the respondent/plaintiff.

I **Abdul Malik Ishak J**: This is an appeal against the decision of the learned judge of the Sessions Court, Johor Bahru who had in a recovery proceeding against the appellant/defendant ('the insurance company') allowed the

respondent/plaintiff's claim ('the wife') under s 96 of the Road Transport Act 1987 ('RTA') for the satisfaction of a judgment sum together with interest totalling approximately RM98,000 (this is an approximate figure as the perfected order of the Sessions Court had not been extracted as reflected in the record of appeal) which was obtained by the wife against her husband Chan Siak Heng ('the husband') as owner of a motor car bearing the registration number BAQ 2533 ('motor car') and against her son Chan Tak Boon ('the son') who drove that motor car at the material time. Put in another way, the judgment sum as claimed arose out of Civil Action No 53–218 of 1989–1 where the wife sued her husband as the owner of the motor car and her son as the driver of that motor car in respect of injuries sustained by her while travelling as a passenger in that motor car in the wee hours of the morning on her way to the market stall at Jalan Ah Fook, Johor Bahru. From the statement of claim in Civil Action No 53–218 of 1989–1, it was averred that the accident arose out of the negligence of the son when he collided into the rear portion of motor lorry AAJ 3483, which was parked off the road on the laterite area of the side table. Incidentally, the insurance company had issued a policy of insurance on that motor car covering the husband and all authorized drivers.

The agreed statement of facts between the parties, inter alia, showed that:

(1) the wife and the son were members of the policyholder's household, namely, the husband;

(2) the road accident that gave rise to Civil Action No 53–218 of 1989–1 took place on 4 June 1988;

(3) at the time of the accident, the wife was seated as a passenger in the front seat beside her son who was driving that motor car;

(4) the son was driving the motor car with the authority and consent of his father, the policyholder; this meant that the son was the authorized driver at the material time;

(5) at the material time of the accident, the wife was being driven by her son to her workplace, a market stall at the Central Market, Jalan Ah Fook, Johor Bahru which was run by one Tharmarajoo a/l Chinna Kolanthai ('Tharmarajoo'); and

(6) the wife was paid a monthly salary of RM450 by Tharmarajoo.

In Civil Action No 53–218 of 1989–1, the wife successfully obtained judgment on 21 November 1991 but the insurance company refused to pay when she sought satisfaction of that judgment. This prompted the wife to file the recovery proceeding against the insurance company. To digress, a contract of insurance has been defined by Lord Justice Clerk (Moncrieff) in *Scottish Amicable Heritage Securities Association Ltd v Northern Assurance Co* (1883) 11 R (Ct of Sess) 287 as:

> ... a contract belonging to a very ordinary class by which the insurer undertakes, in consideration of the payment of an estimated equivalent

A before hand, to make up to the assured any loss he may sustain by the occurrence of an uncertain contingency. It is a direct, not an accessory obligation like that of a surety, and is fulfilled and terminated by payment of the loss.

It must not be forgotten that the protection given by a contract of insurance B is not protection against accident, for that contract can never prevent an accident from happening. It merely secures for the assured, when the accident happens, the payment of a sum of money (the *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 658).

Reverting back to the present appeal, both parties agreed that only C two issues need to be explored. They are:

(1) Whether the insurance company is liable to pay the wife for the judgment which she obtained on 21 November 1991 under the policy of insurance granted to the husband especially s II cl 1(a) and cl 9 endorsement D.

D (2) Whether the judgment in Civil Action No 53–218 of 1989–1, the enforcement of which is done through the action herein (namely, Civil Action No 52–804–91(3) — the present appeal), is invalid on the ground that the plaintiff in Civil Action No 53–218 of 1989–1 had sued her husband for a tort purportedly committed by him and that such action was not, therefore, maintainable by virtue of s 9(2) E of the Married Women Act 1957.

First issue

Mr Philip Nainan for the wife argued that since the husband was insured by the insurance company, the latter must satisfy any liability incurred by the husband under the policy as provided for under s 96 of the F RTA which must necessarily include, so said Mr Philip Nainan, the son who was the driver of the motor car and who drove that motor car as an authorized driver. That the husband's insurance cover includes the son as his authorized driver is clearly reflected in the private motor car policy ('the policy') of the husband at p 101 of the appeal record, particularly G s II under the column 'Liability to Third Parties' thereto, where cl 2(a) thereof reads as follows :

> In terms of and subject to the limitations of and for the purposes of this section the company will indemnify:
>
> (a) any authorized driver who is driving the motor vehicle provided that H such authorized driver:
>
> (i) shall as though he were the insured observe fulfill and be subject to the terms of this policy in so far as they can apply;
>
> (ii) is not entitled to indemnity under any other policy.

Flowing from this, it was next argued that all the wife need do to prove that I the insurance company must satisfy the judgment obtained in Civil Action No 53–218 of 1989–1 was to show that the injuries sustained by her were the direct result of the negligence of her son as the authorized driver of the motor car at the material time.

Mr RA Kumar, for the insurance company, argued that the wife falls under the category of persons whom the insurance company under the policy will not have to indemnify for the negligence of the son as the authorized driver of the insured (the husband). It was said that the coverage under the policy did not extend to her.

In a nutshell, Mr RA Kumar argued that though family members can travel in the motor car of the husband during the subsistence of the policy, there was no passenger liability cover and consequently, in the event of an accident, that passenger (in this case, the wife) will not be covered by the policy and the insurance company is not bound under the policy to indemnify the husband as the policyholder. It is Mr RA Kumar's contention that the insurance company is not obliged under the policy to satisfy the judgment in Civil Action No 53–218 of 1989–1. Mr Philip Nainan argued to the contrary and stressed that the policy covered the situation of the wife and there was no need on the part of the husband to take out a passenger liability cover. Under the policy, so submitted Mr Philip Nainan, the insurance company has an obligation to satisfy the judgment in Civil Action No 53–218–1989–1.

I am told that I am breaking new ground as my decision, if I am with the wife, would prevent the insurance company from insisting that a passenger liability cover be taken to cover the wife who is being carried in the husband's (policyholder's) motor car which was driven by her son as the authorized driver even though the policy is sufficiently worded to cover such an exigency.

To ascertain and construe the extent of the coverage as provided under the policy, it is now appropriate to reproduce certain parts of the policy.

'Section II — Liability to Third Parties', under cl 1(a) of the policy, reads as follows:

> The company will subject to the limits of liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:
>
> (a) death of or bodily injury to any person except where such death or injury arises out of and in the course of the employment of such person by the insured and excluding liability to any person being a member of the insured's household who is a passenger in the motor vehicle unless such person is being carried by reason of or in pursuance of a contract of employment.

Clause 9 of the policy reads as follows:

> The due observance and fulfilment of the terms of this policy in so far as they relate to anything to be done or not to be done by the insured and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the company to make any payment under this policy.

Immediately following cl 9 of the policy appears the following words:

ENDORSEMENTS

The following endorsements only apply to this policy when specifically mentioned in the schedule and are subject otherwise to the terms and conditions of this policy.

Endorsement D reads as follows:

D EXCLUSION OF PASSENGER LIABILITY

Notwithstanding anything contained herein to the contrary, it is hereby understood and agreed that the company shall not be liable in respect of death of or bodily injury to any person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon, or entering or getting on to or alighting from any vehicle in respect of which indemnity is granted under this policy at the time of the occurrence of the event out of which any claim arises.

Now, s II cl 1(a) of the policy generally lays down the extent of coverage in respect of third party liability. The insurance company will idemnify the policyholder in respect of injuries suffered by a third party arising out of the use of the policyholder's motor car, subject to two exceptions:

(1) the third party was injured 'in the course of the employment of such person by the insured [the policyholder]',

(2) the third party as a passenger 'was a member of the insured's [the policyholder's] household'.

But the insurance company, as an exception to number (2) above, will indemnify the policyholder in respect of the injuries suffered by a member of the policyholder's household if the member of that household were, at the material time, a passenger 'by reason of *or* in pursuance of a contract of employment'.

The first part of s II cl 1(a) of the policy as can be seen above speaks of an exception when the policy will not give coverage for death or bodily injury to a third party; and that exception will only arise in a situation 'where such death or bodily injury arises out of the employment by the insured [the policyholder]'. But, interestingly, as far as the authorized driver is concerned, s II cl 1(a) of the policy is silent and this must necessarily mean that the third party need not be employed by the authorized driver. It must not be forgotten, as stated earlier, that the policyholder must necessarily include the authorized driver (see cl 2(a)(i) of the policy). When the need arises, like in the present appeal, for the court to determine the liability of the authorized driver, then the court must substitute the policyholder with that of the authorized driver in every relevant place in the policy; and from there, the court must determine whether the same limitations would apply. The same method was adopted in *Richards v Cox* [1943] 1 KB 139 (CA). In that case, the motor insurance policy provided that the plaintiff's employers were indemnified against liability in respect

of injury to third parties, excluding injury to any person in their employment arising out of and in the course of the employment. The policy further provided that the insurers:

> ... will treat as though he were the insured person any person who is driving such vehicle on the insured's order or with his permission ... provided that such person shall as though he were the insured observe, fulfill and be subject to the terms conditions and exceptions of this policy in so far as they can apply.

The plaintiff there was involved in an accident while being carried as a passenger in her employer's lorry which was driven by another employee by the name of Robson and who was, at the material time, an authorized driver of the insured (Dickerson Brothers). Though the policy as recited above denied liability to persons injured in the course of employment with the insured, yet the court there held that the policy still covered the plaintiff in respect of her claim against the authorized driver who was not her employer. Goddard LJ, at p 144, had this to say:

> We are concerned, however, not with what the company intended, but with what they undertook by the policy, and by its terms, I think that they undertook to treat an authorized driver as though he were the insured, at the same time making him subject to the conditions of the policy. I can only read that as meaning in the present case that when a claim is made against the authorized driver the name of Robson is to be substituted in the policy for that of Dickerson Brothers.

Finally, at p 143 Goddard LJ concluded that:

> Therefore, in the policy before us, if you substitute a new policyholder for Dickerson Brothers you find that Robson is insured. You then find that the plaintiff would not have been one of the persons who, if they had claimed, would have been held to be excluded from the policy by reason of the fact of being a servant of the policyholder. She was not a servant of Robson, who alone is to be regarded as the policyholder for the purpose of this claim.

The plaintiff in *Lim Eng Yew v United Oriental Assurance Sdn Bhd* [1989] 1 MLJ 454 sued the defendants pursuant to s 80(1) of the Road Traffic Ordinance 1958 as a result of injuries suffered in a motor accident caused by the negligence of the driver of the motor lorry in which he was travelling. At the time of the accident, the plaintiff was being carried as a passenger in the motor lorry pursuant to an employment contract between him and the vehicle owner.

The insurance policy covering the lorry, issued by the defendants to the vehicle owner, indemnified the vehicle owner against all sums which the vehicle owner or any authorized driver might be liable to pay as damages or compensation in respect of death of or bodily injury to any person caused by or arising out of the use of the vehicle, including costs. The plaintiff had sued the authorized driver of the vehicle at the time of the accident and had obtained judgment for damages. In their defence, the defendants relied on exception (ii) of the exceptions to s II in the policy,

which stated that the company shall not be liable in respect of death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment. Ajaib Singh J (as he then was) at p 456 had this to say:

> It will be seen from the above provisions in the policy that under para 2 of s II, 'Liability to Third Party', an authorized driver would be indemnified by the insurers as though he was the insured. This means that Lim Swee Keong, the authorized driver in this case, was separately covered under the terms of the policy, and the plaintiff was certainly not a person in the employment of Lim Swee Keong as envisaged under exception (ii) in the exceptions to s II.

Across the causeway, in Singapore, in the case of *Chan Kum Fook & Ors v The Welfare Insurance Co Ltd* [1975] 2 MLJ 184, the facts were that the first and the second plaintiffs were employees of Century Engineering Co ('the company'). Whilst travelling as passengers in the company's motor van driven by its employee, one Yong Chan Seng, and in the course of employment, the first and second plaintiffs sustained injuries when the said motor van ran off the road and crashed into a tree owing to the negligence of Yong Chan Seng. The third plaintiff, who was the father of the second plaintiff, was put to loss and expense. The three plaintiffs claimed damages against the owner of the motor van and Yong Chan Seng. The motor van was insured under a policy issued by the defendants. The plaintiffs in this case relied on ss 4(3) and 8(1) of the Motor Vehicles (Third Party Risks and Compensation) Act (Cap 88). The defendants, on the other hand, relied on exception (ii) to s II of the policy and denied liability to make any payment to the plaintiffs. Exceptions (ii) and (iii) to s II read as follows:

> The Company shall not be liable in respect of:
>
> (i) ...
>
> (ii) death of or bodily injury to any person in the employment of the insured arising out of and in the course of such employment;
>
> (iii) death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises.

Tan Ah Tah J of the Singapore High Court delivered the judgment and at p 185, his Lordship had this to say:

> In my opinion the effect of the words in brackets in exception (iii) is to make the defendants liable in respect of injuries sustained by the first and second plaintiffs who were passengers 'carried by reason of or in pursuance of a contract of employment'. In the case of *Izzard v Universal Insurance Co Ltd* [1937] 3 All ER 79, Lord Wright said at p 81:
>
> It is clear that, though passenger risk in the full sense of the term is excluded, a certain limited class of passenger risk is specifically covered,viz,

that described in the words in brackets in (c) quoted above, which is in the form of an exception to an exception, and thus constitutes a positive cover.' A

On the effect of cl 2 in s II of the policy, his Lordship Tan Ah Tah J said (at the same page):

> There is no doubt that Yong Chan Seng was the authorized driver of the motor van. It has also been conceded by counsel for the defendants that Yong Chan Seng was not entitled to indemnity under any other policy. The first and second plaintiffs were clearly employees of the company and not of Yong Chan Seng. As to the meaning of the phrase 'the terms of this policy' it is relevant to refer to the words 'not this policy witnesseth that in respect of events occurring during the period of insurance and subject to the terms, exceptions and conditions contained herein or endorsed herein (hereinafter collectively referred to as 'the terms of this policy').
>
> It is clearly stated in cl 2 in s II of the policy that the company ie the insurance company will indemnify any authorized driver who is driving the motor vehicle provided that certain conditions are observed. In my opinion all the relevant conditions have been complied with. Judgment having been entered against Yong Chan Seng in the consolidated action, the defendants must now indemnify him against the claims of the three plaintiffs. The facts of this case bear some resemblance to the facts in *Richards v Cox* [1943] 1 KB 139.

Another Singapore case to consider would be *China Insurance Co Ltd v Teh Lain Lee & Anor* [1977] 1 MLJ 1, where the appellants by a policy of insurance dated 28 November 1970 agreed to indemnify one Hassan, the policyholder, and any other person driving on the policyholder's order or with his permission against liability at law in respect of the death or bodily injury to any person caused by or arising out of the use of the policyholder's motor lorry ND 6796. On 24 August 1971, one Cheng Keng, a servant of the policyholder, was killed as the result of a collision between motor lorry ND 6796 and another motor vehicle. At the time of the collision, one Khoo Chia Wah, a servant of the policyholder, was driving motor lorry ND 6796 on the order of the policyholder and in the course of his employment. The respondents, as legal representatives of the estate of the deceased, brought an action against the drivers of the vehicles claiming damages and obtained judgment against Khoo Chia Wah. The Court of Appeal dismissed Khoo's appeal against the judgment. As a result of Khoo's refusal to pay the judgment sum, another action was commenced against the insurers before D'Cotta J, who gave judgment in favour of the respondents. The appellants appealed against the said judgment. The appellants contended that in para 2 of s II of the policy, the obligation of the insurer to indemnify 'any authorized driver' was 'subject to the limitation of (s II)' and 'exceptions to s II' must apply to an authorized driver who claimed to be indemnified under the policy. They further argued that at the time of the accident, the deceased was a servant of the policyholder in the course of his employment; the liability of Khoo Chia Wah was, therefore, not covered by the policy on the true construction of the policy. In dismissing the appeal, Wee Chong Jin CJ, delivering the judgment of the Court of Appeal, had this to say (at p 4):

A Instead of the words 'the company will treat as though he were the insured person any person' in the English policy, the present policy contains the words 'the company will indemnify any authorized driver'. In our opinion the reasoning of Scott LJ from the passage we have just quoted applies with equal force to the corresponding provisions of the policy in the present case. It is to be observed that if the contention of counsel for the appellants is B correct the liability of the appellants as insurers to indemnify an authorized driver, which is separate and distinct from the liability to indemnify the insured, does not extend to cover death or injury to employees of the insured and this, in our opinion, would be contrary to the provisions of s 4 of the Motor Vehicles (Third Party Risks and Compensation) Act.

C It is germane to mention here that both the Singapore cases cited above and the case of *Richards v Cox* were considered by Ajaib Singh J (as he then was) when his Lordship wrote the decision of *Lim Eng Yew v United Oriental Assurance Sdn Bhd.*

Now, reverting back to the present appeal, it would be ideal to ascertain whether the wife was covered by the policy. For this purpose, one D must ask a simple question as to whether the wife was a third party for the purposes of the policy. The answer would definitely be in the positive. The next question to ask would be: whether the wife was injured in the course of her employment with the son ? The answer would be a resounding 'No' as from the facts, the wife was never in the employment of her son. E On this basis alone, it is my judgment thwat the wife falls squarely under s II cl 1(a) of the policy and consequently, she is entitled to claim under the policy. The insurance company has no choice but to satisfy her claim.

The next exception under s II cl 1(a) of the policy revolves on the construction of the words 'being a member of the insured's household'. It is now trite law that in determining the true nature of a contractual F relationship between the parties, the courts will have to consider the intention of the parties. In *Mohamed Mustafa v Kandasami* [1979] 2 MLJ 109 (FC), the Federal Court had to consider an agreement and ascertain whether an agreement entered into between the landlord and tenant was to grant a lease or a licence. The Federal Court held that 'in the G circumstances, the dominant intention of the parties is ... to give a licence ... '. The Federal Court further emphasized that as the parties had entered into a written contract, the true intention of the parties is to be 'gained from the document itself' and consequently, the Federal Court disagreed with the findings of the trial judge that the written agreement was inconclusive and that oral evidence should be adduced to ascertain the H intention of the parties. The Federal Court proceeded to state that the views of the trial judge in taking into consideration 'surrounding circumstances and the conduct of the parties both before and after the occupation of the said premises' were not relevant in the instant case.

In ascertaining whether the wife is not a member of her son's I household but in fact a member of her husband's household, as the husband is the head of her family, arising from the words 'being a member of the insured's household', the sage observations of Lord Brightman in the Privy Council case of *Watson v Phipps* (1985) 60 ALJR 1 immediately

come to mind. In that case, in an appeal from Queensland, Australia his Lordship Lord Brightman had this to say:

> The function of a court of construction is to ascertain what the parties meant by the words which they have used. For this purpose the grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further: see the speech of Lord Wensleydale in *Grey v Pearson* (1875) 6 HLC 61 at p 106, repeated by Lord Blackburn in *Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114 at p 131.

Another rule of construction is that when the words in their ordinary meaning give rise to two distinct interpretations resulting in an ambiguity, the contra proferentum rule would apply. Lindley LJ explains the rule aptly in *Cornish v The Accident Insurance Co Ltd* (1889) 23 QBD 453 in the following words (at p 456):

> ... in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions.

To elaborate, reference may be made to *English v Western* [1940] 2 All ER 515, where the facts were that W was the owner of a policy which generally covered third party liabilities but denied indemnity for injuries of passengers that were 'members of the insured's household'. E, who was the sister of W, was injured in an accident while being driven by W. The insurance company denied liability claiming she was not covered by the policy. The court held that due to the ambiguity inherent in that phrase, the contra proferentum rule applied. It was construed that since the brother was not the head of the sister's family, she was not a member of her brother's household. She was held to be covered by the policy. Clauson LJ delivered the decision of the court and in erudite terms, this was what he said (at p 519):

> A man may be related to a household in two ways. He may be a member of the household or he may be the head of the household ... . In other words, in my judgment, either of the two competing meanings of the phrase 'a member of the assured's household' is possible and natural, and accordingly, there is, in the truest sense, an ambiguity in the phrase. There is no doubt that, if the phrase used in the policy is in this sense ambiguous, that meaning which is less favourable to the insurance company which has put forward the policy must be chosen.

Back home in Malaysia, the Federal Court, in the case of *Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud* [1979] 2 MLJ 29, applied the contra proferentum rule in an insurance policy in favour of the assured. In that case, briefly, there was a dispute as to the interpretation of a provision in a policy of insurance. The Federal Court pointed out that the general rules of interpretation apply to insurance policies as in any other written document. The Federal Court per Raja Azlan Shah FJ (as he then was) held (at p 32) that:

A

> It also seems to me that as between the assured and the insurers, the exception clause in the proviso, on the ordinary principles of construction has, as far as possible, to be read against the insurance company, that is to say, if there is a doubt as to its extent and the question were to arise as to the liability of the insurers, the construction most favourable to the assured must be given to him.

B

Mohamed Azmi J (now FCJ) adopted the same stand in *Central Lorry Service Co Sdn Bhd v The American Insurance Co* [1981] 2 MLJ 40, when his Lordship said (at the same page):

> In my view, there is only doubt and ambiguity in the clause as to whether the policy covers any accident to the vehicle or is merely confined to
C accidents caused by the vehicle involuntarily leaving the road or by break-down of bridges. In construing insurance policies, the contra proferentum rule should apply if there is ambiguity or doubt as to the extent of the policy. Since the policy is prepared by the insurance company, the doubt and ambiguity should be construed in favour of the insured, namely, the plaintiff in this case. In the event, I hold that the policy covers all accidents to the
D vehicle and that the two events described in the clause are mere examples and not exhaustive. The plaintiff's claim is, therefore covered by the Inland Transport clause in the policy.

In almost the same vein, Lord Brightman in the Privy Council case of *Kandasami v Mohamed Mustafa* [1983] 2 MLJ 85 said (at p 88) :

E

> ... there is a principle of construction that if a document inter partes contains an ambiguity which cannot otherwise be satisfactorily resolved, it is to be construed adversely to the party who proffered it for execution.

Applying the contra proferentum rule to the present appeal, I hold that the wife is not a member of her son's household for the simple reason that he
F is only her son, and not the head of her family. I too hold that the policy covers the claim of the wife against her son as the authorized driver and I further hold that, solely on this ground, the insurance company is bound to satisfy the judgment obtained in Civil Action No 53–218 of 1989–1.

Next, in considering the insurance company's liability in respect of
G the claim by the wife against her husband, one must not lose sight of the fact that the wife was in her husband's motor car by reason of going to her place of employment. At about 5am that morning (see the statement of claim at p 89 of the appeal record), she was being driven to her place of employment at the market stall by her son. She travelled that morning to
H enhance the family's income for practical and business reasons. Applying the contra proferentum rule to the words in brackets as found in cl 9 of endorsement D, the contract of employment can either be with the policyholder, namely, her husband or it can be with a third party like Tharmarajoo, the owner of the market stall. This may be the other variety as envisaged by Lord Wright in *Izzard v Universal Insurance Co* [1937] 3
I All ER 79, when his Lordship said (at p 84) 'similar instances could be multiplied.' The wife was in the husband's motor car 'by reason of' her contract of employment with Tharmarajoo. If the insurance company

intends to exclude the wife, such exclusion must be expressly stated in the policy. I am not prepared to infer that the policy was meant to exclude the wife. Lord Wright in *Izzard v Universal Insurance Co* at p 83 rightly stated the correct interpretation of the words 'contract of employment' when he said:

> I cannot accept the respondent company's contention that 'contract of employment' should be construed in the [Road Traffic] Act as subject to the implied limitation 'with the person insured by the policy'. Such a departure from the clear language used cannot, I think, be justified. I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons, and have taken a contract of employment in pursuance of which they are on the vehicle as an adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person.

Lord Wright, in the same case, continued at pp 83–84 in trenchant terms:

> The most probable case is where the man killed or injured was on the vehicle in pursuance of a contract, not with the owner of the vehicle, but with someone else, for instance, with the person whose goods were being carried on the vehicle: thus, a commercial vehicle, carrying a contractor's or merchant's goods, would frequently, and perhaps, even normally, have on it an employee of the goods' owner to see to loading or unloading or delivering the goods, or caring for them in transit. For these purposes such a man may be carried as a passenger. The insured person may come under third party liability to such a man, who may be described as being in the position of an invitee in the legal sense, vis-à-vis the insured person. A further illustration, which comes under the same category, is that of an employee or employees of the owner of the goods which are being carried, who go out on the lorry with the goods and return home in the lorry after the goods are delivered. Such employees may properly be regarded as passengers carried in pursuance of a contract with someone other than the insured person. A further illustration is afforded by the facts like those of the present case. Izzard and his mates were being carried, so the arbitrator has found, for purposes of the trade in which the truck was engaged, and as an incident of the haulage, so far as Druce was concerned. The arbitrator has found that the vehicle was being used for haulage purposes, and I see no reason in law for doubting this finding. Similar instances could be multiplied.

I am of the considered view that if the insurance company wishes to exclude the wife under the policy, then the insurance company must say so in plain simple terms, so that the husband would not continue paying his premium under the belief that in the event of an accident involving his wife as a passenger in his motor car, the insurance company will bear the financial loss. I am fortified in my view by the passages appearing in the judgment of Ong CJ (Malaya) (as he then was) in *Wong Kon Poh v New India Assurance Co Ltd* [1970] 2 MLJ 287 (FC), where his Lordship said (at p 288):

> If, contrary to common sense, the insurance company still maintains that the perils insured against are different, so that it is not bound to indemnify the victim of a robbery where the policy covers only loss by theft, then it is the duty of the insurers to say so in plain terms, so that policy-holders may

A not continue to pay their premiums under a misapprehension as to the exceptions to liability. In para 703 of MacGillivray the contra proferentum rule is thus set out:

> 'If there is any ambiguity in the language used in a policy, it is to be construed more strongly against the party who prepared it, that is in the majority of cases, against the company. A policy ought to be so framed that
B he who runs can read.'

> At all events, to deny the axiomatic truth of the proposition that 'robbery is an aggravated form of theft' and to dismiss the appeal on that ground is manifestly a denial of justice upon a technical defence which has absolutely no merits. A policy which insures against loss by 'burglary, housebreaking
C or theft', but says nothing of 'robbery', must on any reasonable construction be held to include 'robbery' within the coverage for 'theft'. Like burglary or housebreaking, robbery is merely a variation of the same theme. Otherwise its exception must clearly and expressly be made known to the party insured — not by implication to be inferred from the omission. To require that the ordinary man taking out a policy should read into it not only what was
D expressed, but also to construe omissions as exceptions, is an absurd proposition which this court cannot countenance.

Another approach to be adopted in construing cl 9 endorsement D is to consider the words in brackets disjunctively. This construction would mean that the expression 'by reason of a contract of employment' must be
E read disjunctively from the expression 'in pursuance of a contract of employment' because of the presence of the word 'or' in between those expressions. To say that those expressions should be read conjunctively is doing violence to the word 'or' inserted therein. When read disjunctively, as I so hold, then by reason of a contract of employment with Tharmarajoo, the wife could obtain satisfaction in regard to Civil Action No 53–218 of
F 1989–1 against the insurance company. I should and could take judicial notice of the notorious fact, of what everybody knows, that the public transport system in Johor Bahru in the wee hours of the morning is practically unreliable (see *Daning bin Laja v KK Haji Tuaran bin Majid* [1993] 1 CLJ 44). This does not mean that I am not unmindful of what
G their Lordships of the Privy Council said in *Harpushad v Shoe Dyal* (1876) LR 3 IA 259 to the effect that 'a judge cannot without giving evidence as a witness import into a case his own knowledge of particular facts.' But as was said by Good J in *Yong Pak Yong v PP* [1959] MLJ 176 at p 177:

> ... we members of the judiciary sitting in these courts cannot avoid acquiring
H a very considerable knowledge, from the cases that come before us, of the activities and the prevalence of secret societies ... Everyday, or almost every day, week after week, and month after month, I open my morning paper and this is the sort of thing I read ...

Now, having disposed of running-down cases in this court, surely I have acquired considerable knowledge of the notorious unreliability of the
I public transport system in Johor Bahru, particularly in the wee hours of the morning. Be that as it may, must the wife travel by bus at that hour of the morning to go to work when there is a motor car in the house? Must the husband be expected to disallow the wife to travel in the motor car driven

by his son, an authorized driver? When the husband allowed the wife to travel in his motor car as a passenger with his son behind the wheel, the husband must have been motivated by the policy which was in existence then and which the husband must have thought would cover his wife in the event of an accident. These are questions and inferences that are germane and would certainly apply to the present appeal. The *Pocket Oxford Dictionary* defines the word 'or' as 'introducing alternatives'. The *Britannica World Language Dictionary* defines 'or' as 'the alternative expressed by or is emphasized by prefixing to the first member, or adding after the last'. Put in another way, when there are several possibilities 'or' is placed before the last one. This means that when the word 'or' is used, there is a choice to be made between one or the other; and not to accept both of them. Thus, the word 'or' appearing in the bracketed words of cl 9 endorsement D reflects the intention of the insurance company to construe the word 'or' as disjunctive and not conjunctive.

When the wife sued her son in Civil Action No 53–218 of 1989–1 as the authorized driver for the tort of negligence, she joined the policyholder, who happens to be her husband, purely for the purpose of vicarious liability and also to meet the requirement of s 96 of the RTA for the simple reason that the damages would be paid by the policyholder's insurance company. By virtue of the terms of the policy, I hold and it is my judgment that the wife can enforce that policy against either the policyholder (the husband) or the authorized driver (the son) and the paymaster, at the end of the day, would be the insurance company. An unreasonably strict construction should not be adopted in construing the policy as it will result in manifest injustice to the husband. Insurance companies should not offer, with impunity, seemingly wide coverages to their customers but only to deny liability on tenuous grounds when a claim is actually made. This should not be the case and this court will not countenance it. I would, for the reasons adumbrated above, answer the first issue in favour of the wife.

Second issue

The inter-spouse issue arises under s 9(2) of the Married Women Act 1957, which enacts as follows:

> Except for the protection or security of his or her property no husband or wife shall be entitled to sue the other for a tort.

It is crystal clear that s 9(2) of the Married Women Act 1957 does not prevent all actions against a spouse, only actions in tort. In Civil Action No 53–218 of 1989–1, the wife sued the son for the tort of negligence and it was averred at para 4 of the statement of claim at p 89 of the appeal record that 'the said collision was caused solely by the negligence of the second defendant (namely, the son).' The particulars of negligence on the son's part was also itemized in the statement of claim. Thus, when the wife sued the son, it did not mean that she sued her husband. The deeming provision that the husband is said to be responsible for the act of his son is only for the purpose of establishing vicarious liability in order to obtain the damages from the insurance company and also to comply with the requirement of

A s 96 of the RTA. Put in another way, the action against the husband as a policyholder stems not from the tort of negligence but from the vicarious liability that attaches to him for the tort of negligence of his authorized driver, namely, his son. The policyholder husband was not the tortfeasor in Civil Action No 53–218 of 1989–1. Since there is no tort known in law as the tort of 'vicarious liability', s 9(2) of the Married Women Act 1957 is not applicable.

It is also germane to mention that the words employed in s 9(2) of the Married Women Act 1957 does not say 'for a tort deemed to be committed for the purpose of vicarious liability' and without those words, I am not prepared to hold that that subsection extends to the vicarious liability of the husband. The only way to interpret s 9(2) of the Married Women Act 1957 is by looking at the very words employed therein without having to resort to outside aid.

On the principle of agency, I need to rely on the case of *Smith v Moss & Anor* [1940] 1 All ER 469 where Mrs R was the owner of a car, but was unable to drive it. Her son drove it for her, as the judge found, as her agent. The car was garaged at the son's house. On 1 January 1938, the son drove his mother and his wife home from a party; and having set his mother down at her house, drove the car to the garage at his own house, his wife being a passenger in the car. On the way, an accident occurred by reason of the son's negligence and the wife was injured. The wife sued the mother for damages for personal injuries and it was pleaded that the wife could not recover in respect of her husband's negligence. It was held that at the time of the accident, the husband was acting as the agent of his mother and the wife was entitled to recover. Charles J had this to say (at p 470):

> It is said that, although the son was, as I have held, acting as the agent of his mother, the wife cannot recover damages in respect of her injuries against the mother-in-law, because the accident was caused by the negligence of her husband (for so I find) and a husband can commit no tort against his wife. I cannot conceive, however, that the mere fact that he is acting as an agent for someone else, and, while acting as such agent, happens to commit a tort, such as negligence in the driving of a motor car in which his wife is a passenger, deprives his wife of her rights against his employer — that is to say, the wife's mother-in-law. It is true she paid no wages, but she was a person who was using him as her agent to drive the car.

Now, *Smith's* case sets a limit upon the principle that a wife cannot recover in respect of her husband's tort. Where the tort of negligence is committed as the agent of a third person, the negligence is, in law, that of the third person and a wife is entitled to succeed in an action against the third party. Applying the principle of agency to the present appeal, the son was the agent of the husband when the son drove that motor car and it was through the son's negligence that the wife was injured. The wife is entitled, therefore, to recover from the husband because of his agent's (the son's) negligence. As a policyholder, the husband would be vicariously liable to the wife and consequently, the insurance company must satisfy the judgment

which she obtained in Civil Action No 53–218 of 1989–1. On the facts, *Smith*'s case is poles apart from the present appeal. In *Smith*'s case, it was an action by the wife for the tort of her husband which was committed by her husband as an agent of a third party (his mother) and the wife also brought an action against the third party (the husband's mother).

It has been argued in the present appeal that the wife cannot sue the husband and this was said to be the exact prohibition envisaged in s 9(2) of the Married Women Act 1957. Mr RA Kumar had earlier argued for the insurance company that for the wife to succeed, there must be in existence a passenger liability cover. Now, if one were to accept that there should be a passenger liability cover, the scenario would be like this. The wife will have to sue the son as the negligent driver and even though there is a passenger liability cover, the wife has to sue the husband in the husband's capacity as a policyholder. At this juncture, must the insurance company mount an argument that since the wife has joined the policyholder husband as a party to the action, then the civil action would be converted as an action by the wife against the husband that would be barred by s 9(2) of the Married Women Act 1957? With respect, an argument of this nature would certainly make a mockery of s 96 of the RTA and the insurance law in the country generally and which this court will not countenance. Fortunately, the facts in the present appeal are entirely different. Here, there was no necessity for the husband to take a passenger liability cover, as I held in the early part of this judgment, because the policy is sufficiently worded to protect the wife and to enable the wife to obtain satisfaction against the insurance company. Section 9(2) of the Married Women Act 1957 speaks of a tort committed by the husband whereas, on the facts of the present appeal, no tort was committed by the husband. Simple logic and pure common sense would exclude the operation of s 9(2) of the Married Women Act 1957 from the present appeal and I so hold accordingly.

By way of an alternative, in the event I am wrong in my interpretation of s 9(2) of the Married Women Act 1957 in that the action against the husband was in fact in the nature of an action in tort and consequently barred, yet the action by the wife can be construed to be an action to protect her property which by virtue of s 9(1) of the Married Women Act 1957 would be permissible. Section 2 of the Married Women Act 1957 defines 'property' to include a thing in action and by s 9(1) of the same Act, it is enacted that:

> Every married woman shall have in her own name against her husband, the same remedies and redress for the protection and security of her property as if such property belonged to her as a *feme sole*.

In *Curtis v Wilcox* [1948] 2 All ER 573, the Court of Appeal there had occasion to consider the meaning of a thing in action in relation to the property of a married woman under the Married Women's Property Act 1882. The facts in that case were that an unmarried woman sustained

injuries in a motor car accident which was caused by the negligence of the man she subsequently married. It was held that the right of action which accrued before marriage was a 'thing in action' within the meaning of s 24 of the Married Women's Property Act 1882, and was, therefore, the wife's property within the meaning of s 12 of the Act, for the protection and security of which she was entitled to maintain an action against her husband. Wynn-Parry J, delivering the judgment of the Court of Appeal, had this to say (at p 575):

> We agree with the view of the learned judge that a right of action in tort is a thing in action. On this point a number of legal dictionaries and abridgements, some of them of considerable antiquity, were referred to by McCardie J in his judgment and we were referred to some of these and a number of others by counsel. We do not propose to refer to them in any detail. It is sufficient to say that, apart from a statement in *Blackstone's Commentaries* Vol II at p 397, that all property in action depends on contracts, either express or implied (a statement on which the editor of the 21st Ed makes the comment 'This is too limited, since a right to recover damages for a wrong is a chose in action which does not arise out of any contract'), all the books to which we were referred treat a right of action to recover damages for a tort as being a thing in action. This view has the great authority of Sir George Jessel MR to support it.

At p 576 of the same judgment, his Lordship Wynn-Parry J continued:

> The effect of s 2 [of the Married Women's Property Act 1882], the language of which is unambiguous, is that in her separate property there is or can be included without exception all the real and personal property which belongs to her at the time of the marriage, while the definition of property in s 24 makes it clear beyond doubt that, as the language of s 2 itself indicates, her personal property includes her things in action. Under s 12 the right of suing which is given to a married woman extends, so far as concerns what may be the subject matter of the action, to all her property. The limitation which is imposed by the section is not on the kind of property which may be the subject of an action by her, but only on the purpose for which the action may be brought; it must be for the protection or security of her property. It follows, in our judgment, that there is no ground to be discovered in the language of the relevant sections of the Married Women's Property Act 1882, for holding that 'thing in action' is used in that Act in any limited sense. In our judgment, therefore, *Gottliffe v Edelston* [1930] 2 KB 378 was wrongly decided and is not good law.

In the present appeal, as stated earlier, the action against the husband founded on vicarious liability was, applying *Curtis v Wolcox*, purely to protect her property in the cause of action against her son. This being the case, her action against her husband protected under s 9(1) of the Married Women Act 1957 was, consequently, not prohibited by s 9(2) of the same Act. This meant that the insurance company must shoulder and satisfy the judgment obtained by the wife in Civil Action No 53–218 of 1989–1. Accordingly, I would answer the second issue in favour of the wife.

For the reasons adumbrated above, I dismissed the appeal by the insurance company with costs. The decision of the learned judge of the Sessions Court, Johor Bahru is hereby affirmed.

Appeal dismissed with costs.

Reported by TA Loh